

CHAPTER 9

Brief Writing

This chapter addresses the rules governing the filing of briefs with the appellate courts and provides suggestions for crafting an effective brief.

Always consult the appropriate Kansas Supreme Court appellate rules before writing and formatting your brief. The rules on appellate practice are found in the Kansas Court Rules Annotated, an annual publication of the Kansas Supreme Court commonly called the blue book.

The rules are also available online at: http://www.kscourts.org/rules/Appellate_Court.asp To find out whether there have been any recent amendments, check http://www.kscourts.org/rules/New_Rules_and_Amendments/ for updated or amended versions of the rules since the most recent publication.

The Briefing Checklist in Appendix B provides further assistance with brief writing. A sample brief is also included in Appendix B to illustrate how many of the briefing rules are put into practice.

§ 9.1 Time Schedule for Briefs—Rule 6.01

Computation of Time

K.S.A. 60-206(a) and (d) address how to compute time for the purpose of determining a brief due date. For a more detailed discussion of time computation, see § 7.9, *supra*.

PRACTICE NOTE: Until recently, when briefs were still primarily filed by mail, it was common for the three-day mail rule in K.S.A. 60-206(d)

to affect the calculation of a brief due date that was triggered by the service of a previous brief or pleading. As a practical matter, the three-day mail rule will no longer apply in most cases, because parties using the E-filing system will serve briefs by electronic means rather than by mail. If you have questions about how to calculate your brief due date, contact the clerk of the appellate courts.

Appellant's Brief

If no transcripts were ordered, or if all transcripts ordered were filed with the clerk of the district court before docketing, an appellant's brief is due within 40 days of the date of docketing. Rule 6.01(b)(1)(A).

If a transcript was ordered but was not filed before docketing, then an appellant's brief is due within 30 days of service of the certificate of filing of the requested transcript. Rule 6.01(b)(1)(B).

If the record on appeal includes a statement of proceedings under Rule 3.04 or an agreed statement under Rule 3.05, an appellant's brief is due within 30 days after the filing of the statement with the district court. Rule 6.01(b)(1)(C).

PRACTICE NOTE: Although the clerk's office will enter an initial brief due date in the Case Inquiry System on the www.kscourts.org website, that due date is primarily intended as a convenience to the clerk's office, and it will NOT result in a Notice of Electronic Filing (NEF) to the parties. Appellants must keep a close eye on the Case Inquiry System and track when transcripts are completed, because it is up to the appellant to know when the final transcript is filed and then, from that date, calculate the initial brief due date.

However, if the court grants a motion for an extension of time, it will issue an order setting

the next brief due date and that order will be distributed to the parties by an NEF through the E-filing system.

Appellee's Brief or Appellee/Cross-Appellant's Brief

The brief of an appellee or an appellee/cross-appellant is due within 30 days after service of the appellant's brief. Rule 6.01(b)(2).

Cross-Appellee's Brief

The brief of a cross-appellee is due within 21 days after service of the cross-appellant's brief. Rule 6.01(b)(3).

Appellee/Cross-Appellee's Brief

The brief of an appellee/cross-appellee is due within 21 days after service of the appellee/cross-appellant's brief. Rule 6.01(b)(4).

Reply Brief

A reply brief is due within 14 days after service of the brief to which the reply is made. Rule 6.01(b)(5).

Rule 6.05 explains when a reply brief may be submitted and what a reply brief must contain.

PRACTICE NOTE: A reply brief that is combined with a cross-appellee brief would be due 21 days after service of the appellee/cross-appellant's brief.

Extensions of Time

K.S.A. 60-206(b) controls when the court may extend the time to file a brief. See also Rule 5.02 and § 7.31, *supra*. Motions for extension of time to file a brief must be filed before the original deadline to act has expired and state: the present due date, the number of extensions previously requested, the amount of additional time needed, and the reason for the request. Rule 5.02(a).

PRACTICE NOTE: Generally, after three extensions of time (totaling no more than 30 days each) have been granted, the court will issue a

warning that no additional extensions of time will be granted absent “exceptional circumstances.” Extensions of time are not limitless, so plan accordingly.

§ 9.2 Content of Appellant’s Brief—Rule 6.02

Required Elements of the Brief

An appellant’s brief *must* contain:

- A **TABLE OF CONTENTS** that includes page references to each division and subdivision in the brief and the authorities relied upon. Rule 6.02(a)(1).
- A brief **STATEMENT OF THE NATURE OF THE CASE** which should detail the nature of the judgment or order from which the appeal is taken. Rule 6.02(a)(2).
- A brief **STATEMENT OF THE ISSUES** to be decided on appeal. Rule 6.02(a)(3).

PRACTICE NOTE: Rule 6.02(a)(3) specifies that the statement of the issues must be brief and without elaboration. Some practitioners prefer a longer, more detailed issue statement, but that approach may not comply with Rule 6.02(a)(3).
- A concise but complete **STATEMENT OF THE FACTS** that are material to deciding the issues must be presented without argument. They must be keyed to the record on appeal by volume and page number. Rule 6.02(a)(4).
- For example, a pleading found in Record Volume I on page 23 could be cited as: (R. I, 23). The citation should be to the specific page or limited number of pages where the particular fact may be found.
- The court may presume that any factual statement made without such a reference has no support in the record on appeal. Rule 6.02(a)(4). See *Friedman v.*

Kansas State Bd. of Healing Arts, 296 Kan. 636, ¶ 3, 294 P.3d 287 (2013).

- Occasionally, a record on appeal will include both electronic and non-electronic, physical exhibits or documents. When citing to a non-electronic record document, it is helpful to the court to point out that the particular exhibit or document is a non-electronic document.

PRACTICE NOTE: Under Rule 3.02, the clerk of the district court furnishes a copy of the table of contents of the record on appeal to each party. That table of contents shows the volume and page number of each document in the record; all parties should cite to it. Contact the district court clerk if you are writing a brief and have not received a copy of the table of contents.

The facts section of the brief must include *all* of the material facts and *only* the material facts. Avoid statements such as, “Further facts will be developed as necessary.” Avoid referring to issues that will not be raised on appeal. For instance, if the brief does not argue that the district court erred in denying a motion to suppress, including facts about the motion and the hearing on the motion in the statement of facts serves only as a distraction. To avoid including unnecessary or extraneous facts in a brief, try writing the argument section first and the facts section next. Doing so helps the writer pinpoint which facts are important.

Finally, a party should include – but can minimize – negative critical facts. Rambo and Pflaum, *Legal Writing by Design* § 21.6, p. 371 (2001). Do not, however, attempt to “hide the ball” on bad facts. It adds to the credibility of an appellate practitioner to admit when facts may not be entirely favorable. Furthermore, the court will have to deal with those bad facts anyway if they are important to the issues.

- The brief must include an **ARGUMENTS AND AUTHORITIES** section, indicating what case law, statutes and other authorities the party relies on, separated by issue. Within that section, each issue *must begin* with a citation to the appropriate **Standard of Review**. Also each issue *must begin* with a **Preservation** section with a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on or, if the issue was not raised below, an explanation why the issue is properly before the court. Rule 6.02(a)(5).

Generally, issues not raised before the district court cannot be raised for the first time on appeal. *State v. Ortega-Cadelan*, 287 Kan. 157, 159, 194 P.3d 1195 (2008). Exceptions may be granted if: (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; or (3) the district court's judgment may be upheld on appeal despite its reliance on the wrong ground. *State v. Foster*, 290 Kan. 696, 702, 233 P.3d 265 (2010). Before the Court can address the issue for the first time on appeal, the appellant must explicitly identify *which* of these exceptions applies *and provide a detailed explanation why* it is applicable. *State v. J.D.H.*, 48 Kan. App. 2d 454, 459, 294 P.3d 343 (2013).

PRACTICE NOTE: When it comes to authorities included in your brief, choose quality over quantity. String cites are almost always unnecessary. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument*, p. 122 (4th ed. 2009).

Also remember that, separate from the appellate briefing rules, an attorney has an ethical duty under Kansas Rule of Professional Conduct 3.3(a)(2) to provide the court with adverse

controlling authority not otherwise disclosed by an opposing party.

Optional Elements of the Brief

An appellant's brief *may* contain:

- An **APPENDIX** – without comment – consisting of limited extracts from the record on appeal that are critical to the issues to be decided. The appendix is for the court's convenience and is not a substitute for the record itself. It is inappropriate to attach as an appendix any item that is not a part of the record on appeal. See *Haddock v. State*, 282 Kan. 475, Syl. ¶ 21, 146 P.3d 187 (2006) (“An appendix to an appellate brief is not a substitute for the record on appeal, and material so attached will not be considered by this court.”) The brief may make reference to the appendix, but must also include the required reference to the volume and page number of the record on appeal. Rule 6.02(b).

PRACTICE NOTE: A party may cite to an unpublished case in a brief as non-controlling, but persuasive authority. Rule 7.04(g)(2)(B). However, if cited in the brief, a copy of the unpublished opinion must be attached to the brief as either a separate attachment or as part of the appendix. Rule 7.04(g)(2)(C).

§ 9.3 Content of Appellee's Brief—Rule 6.03

Required Elements of the Brief

An appellee's brief *must* contain:

- A **TABLE OF CONTENTS** that includes page references to each division and subdivision and the authorities relied upon. Rule 6.03(a)(1).
- A statement either concurring in the appellant's **STATEMENT OF THE ISSUES** involved or stating

the issues the appellee considers necessary to disposition of the appeal. Rule 6.03(a)(2).

PRACTICE NOTE: Rather than automatically ceding the framing of issues to your opponent, consider whether the issues can be reframed from your client’s point of view.

- **A STATEMENT OF FACTS**, without argument, or a statement concurring with the appellant’s statement of facts, including corrections or additions if necessary. The facts must be keyed to the record on appeal by volume and page number. The court may presume that any factual statement made without such a reference has no support in the record on appeal. Rule 6.02(a)(4); Rule 6.03(a)(3).
- The **ARGUMENTS AND AUTHORITIES** relied on, separated by issue if applicable. Each issue *must begin* with a citation to the appropriate **Standard of Review**. The Appellee must either explicitly concur with the appellant’s suggested standard of review or cite authority to the contrary. Rule 6.03(a)(4).

If the appellee is also a cross-appellant, the brief must also contain:

- A separate section for the **CROSS-APPEAL**, including content similar to the content required for an appellant’s brief under Rule 6.02. This section should avoid duplicating statements, arguments, or authorities contained elsewhere in appellee’s brief. To avoid such duplication, the appellee may make references to the appropriate portions of its brief. Rule 6.03(a)(5).

Optional Elements of the Brief

An appellee’s brief *may* contain:

- An **APPENDIX** – without comment – consisting of limited extracts from the record on appeal that are critical to the issues to be decided. The appendix is

for the court's convenience and is not a substitute for the record itself. It is inappropriate to attach as an appendix any item that is not a part of the record on appeal. The brief may make reference to the appendix but must also include the required reference to the volume and page number of the record on appeal. Rule 6.02(b); Rule 6.03(b).

PRACTICE NOTE: Just like an appellant, an appellee may cite to an unpublished case as non-controlling, but persuasive authority. Rule 7.04(g)(2)(B). A copy of the unpublished opinion must be attached to the brief as either a separate attachment or as part of the appendix. Rule 7.04(g)(2)(C).

§ 9.4 Content of Cross-Appellee's Brief—Rule 6.04

A cross-appellee's brief *must* contain:

- Material similar to the content required for an appellee's brief under Rule 6.03. The brief should avoid duplicating statements, arguments, or authorities contained in the brief of the appellant or cross-appellant. To avoid such duplication, the cross-appellee may make references to the appropriate portions of the opposing brief. Rule 6.04.

§ 9.5 Reply Brief—Rule 6.05

Rule 6.05 allows a reply brief to be filed *only when necessary because of new material* contained in the brief of the appellee or the cross-appellee.

A reply brief *must* include a specific reference to the new material being rebutted and be combined with the cross-appellee's brief in a separate section if filed by a cross-appellee. Rule 6.05.

A reply brief *may not* include any statements, arguments, or authorities already included in a preceding brief, except by reference. Rule 6.05.

PRACTICE NOTE: The party filing the reply brief may not use the reply brief to raise additional issues. *State v. McCullough*, 293 Kan. 970, 984-85, 270 P. 3d 1142 (2012).

A reply brief is not usually the appropriate avenue for submitting new or additional case law to the court. Instead, consider filing a letter notifying the court of additional authority under Rule 6.09. But beware that letters of additional authority under Rule 6.09 have shorter time and word limits than reply briefs. See also § 9.9.

§ 9.6 Brief of *Amicus Curiae*—Rule 6.06

A brief of an *amicus curiae* (friend of the court) may only be filed when an application to file the brief has been served on all parties and filed with the clerk of the appellate courts *and* the appellate court enters an order granting that application. Rule 6.06(a).

PRACTICE NOTE: The application to file an *amicus* brief should state substantial reasons supporting the request and be filed as early in the appellate process as possible.

The brief must be filed at least 30 days before oral argument and served on all parties. Rule 6.06(b). A party may respond to the brief within 21 days of the filing of the brief. Rule 6.06(c).

An *amicus curiae* is not entitled to oral argument. Rule 6.06(d).

§ 9.7 Format for Briefs--Rule 6.07

A brief that does not conform substantially with the provisions of Rule 6.07 will not be accepted for filing. Rule 6.07(f). See Appendix B for a sample brief.

PRACTICE NOTE: Due to the implementation of the E-filing system, the Kansas Supreme Court has recently substantially changed Rule 6.07 regarding the formatting of briefs. All practitioners

should review these changes to avoid rejection of a brief.

- Text, Footnotes, and Reproduction

Text: The text of a brief must be printed in a conventional style font but that font must comply with these measurements: no smaller than 12 point font with no more than 12 characters per inch.

PRACTICE NOTES: The font rule is deceptively simple, but is more complicated in practice. For example, the typical legal font among many practitioners is Times New Roman 12 point. But Times New Roman 12 point does not comply with the Court's font rule under Rule 6.07(a)(1).

Rule 6.07(a)(1) contains a list of suggested (but not required) fonts. Those include: 13 point in Times New Roman, Book Antigua, Century Schoolbook, and Palatino Linotype. Other fonts may also meet the font rule in 6.07(a)(1), but if a practitioner is unsure, double check with the appellate court clerk.

A practitioner should spend time contemplating font choices. Particularly in light of the increased use of electronic briefing, serif fonts may not appear as readable on electronic devices as sans serif fonts. As a result, a move away from serif fonts, including the strangely beloved ancient legal standby of Times New Roman, is probably overdue. "Times New Roman is not a font choice so much as the absence of a font choice, like the blackness of deep space is not a color. To look at Times New Roman is to gaze into the void." Butterick, *Typography for Lawyers*, pg. 110 (2013).

Text, excluding pagination, must not exceed 6.5 inches by 9 inches. Rule 6.07(a)(1). All text must be double-spaced, except block quotations and footnotes which may be single spaced. Rule 6.07(a)(1).

Footnotes: Footnotes are generally discouraged. However, if a footnote is absolutely necessary, it must commence on the same page as the text to which it relates. Rule 6.07(a)(2).

PRACTICE NOTE: Footnotes should be avoided. This is particularly true as the parties and the courts move towards reading briefs electronically. When a brief is viewed electronically, it is rare for full pages of text to be viewed in their entirety. As a result, footnotes can be lost in the dead space at the bottom of the page just outside of the view of the reader.

Reproduction: A brief may be reproduced by any process that yields a clear black image on white paper. The paper must be opaque and unglazed. Only one side of the paper may be used. Rule 6.07(a)(3).

PRACTICE NOTE: When preparing briefs in PDF form for E-filing, keep in mind that manual scanning will result in a larger electronic file than converting directly from Word to a PDF.

- Brief Cover, Color, and Content

The cover of any brief must be white. Rule 6.07(b)(1).

The cover of the brief must include:

- The appellate court docket number. Rule 6.07(b)(2)(A).
- The phrase “IN THE COURT OF APPEALS OF THE STATE OF KANSAS” or “IN THE SUPREME COURT OF THE STATE OF KANSAS,” as appropriate. Rule 6.07(b)(2)(B).

- The caption of the case as it appeared in the district court, except that a party must be identified not only as a plaintiff or defendant but also as an appellant or appellee. Rule 6.07(b)(2)(C).
- The title of the document, *e.g.*, “Brief of Appellant” or “Brief of Appellee,” etc. Rule 6.07(b)(2)(D).
- The words “Appeal from the District Court of _____ County, Honorable _____, Judge, District Court Case No. ____.” Rule 6.07(b)(2)(E).
- The name, address, telephone number, fax number, e-mail address, and attorney registration number of *one* attorney for each party on whose behalf the brief is submitted. An attorney may be shown as being of a named firm. Additional attorneys joining in the brief *must not be shown* on the cover but may be added at the conclusion of the brief. Rule 6.07(b)(2)(F).
- The words “oral argument” on the lower right portion of the brief cover, followed by the desired amount of time if additional time for oral argument is requested in the Supreme Court under Rule 7.01(e) or in the Court of Appeals under Rule 7.02(f). Rule 6.07(b)(2)(G).
- If the brief includes an issue that contests or calls into doubt the validity of any Kansas statute or constitutional provision on the grounds that the law violates the state constitution, federal constitution, or any provision of federal law, the brief *must* be served on the attorney general along with a notice stating that the attorney general is being served under K.S.A. 75-764. See § 12.31, *infra*. Rule 11.01(a). The brief itself *must* also include these specific words, **in bold**, 12 point font, under the case caption on the first page: “Served on the attorney general as

required by K.S.A. 75-764.” See Rule 11.01(b); K.S.A. 75-764.

- Page Limits: The brief must not exceed the following page limits (excluding the cover, table of contents, appendix, and certificate of service, unless the court orders otherwise):
 - Brief of an appellant — 50 pages.
 - Brief of an appellee — 50 pages.
 - Brief of an appellee and cross-appellant — 60 pages.
 - Brief of an appellee and cross-appellee — 60 pages.
 - Brief of a cross-appellee — 25 pages.
 - Reply brief — 15 pages.
 - Brief of an *amicus curiae* — 15 pages. Rule 6.07(d).

A motion to exceed these page limits must be submitted *before* submission of the brief and must include a specific total page request. The court may rule on the motion without waiting for a response from any other party. Rule 6.07(d).

The appellate court hearing a matter may order briefs to be abbreviated in content or format. Rule 6.07(e).

PRACTICE NOTE: Cheating on font size and spacing in order to comply with the page limits “tells the judges that the lawyer is the type of sleazeball who is willing to cheat on a small procedural rule and therefore probably will lie about the record or forget to cite controlling authority.” Rambo and Pflaum, *Legal Writing by Design* § 20.3, p. 344 (2001) (quoting Judge Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325 at 327).

Although many word processing programs include a variety of helpful tools when creating

electronic briefs, at the time of the publication of this handbook, the appellate E-filing system does not allow many of those features to maintain their integrity once the brief is filed. For example, items such as embedded hyperlinks within the brief text are automatically disabled and will not be seen or used by the court.

Accordingly, when including a link to an online source, make sure to include the entire written link so that the judge can manually search for the source in a separate browser.

Specific questions regarding the courts' ability to accept and utilize enriched briefs should be directed to the appellate clerk's office.

§ 9.8 Reference within Brief—Rule 6.08

Unless the context particularly requires a distinction between parties as appellant or appellee, refer to the parties in the body of a brief by their status in the district court, *e.g.*, plaintiff, defendant, etc., or by name. Rule 6.08.

References to certain persons such as children, victims of sex crimes, and jurors are subject to special rules. See Rule 7.043.

PRACTICE NOTE: Referring to a client by name can help humanize him or her. But be consistent. It is acceptable to refer to a party by full name the first time and by either first or last name thereafter, but do not switch back and forth.

Citation of a court decision must be by the official citation followed by any generally recognized reporter system citation. Rule 6.08.

PRACTICE NOTE: Include a pin cite to a specific page or pages of an opinion. Rule 7.04(g) allows the citation of unpublished opinions in specific circumstances, but requires attachment of a printed copy of the opinion.

§ 9.9 Service of Brief

A party agrees to service by electronic means under K.S.A. 60-205(b)(2)(F) when an attorney who is registered as an E-filing user has entered their appearance on behalf of the party. Transmission of the “Notice of Electronic Filing” (NEF) to a registered attorney appearing as a case participant on behalf of a party is an acceptable form of service by electronic means. Rule 1.11(b).

The party filing the brief must include a certificate of service on the last page of the brief. Rule 1.11(c). The certificate of service must include the manner in which service is made, must comply with the signature requirements in Rule 1.12, and must include a date of service. Rule 1.11(c) and (d).

When a brief contests or calls into doubt the validity of any Kansas statute or constitutional provision on grounds that the law violates the state constitution, federal constitution, or any provision of federal law, the party filing the brief *must* serve a copy of the brief, along with a separate notice under Rule 11.01(c), on the attorney general under K.S.A. 75-764. Rule 11.01(a).

PRACTICE NOTE: Even with E-filing, a party may serve its brief on the opposing party by whatever means is preferred; *i.e.*, by fax, e-mail, mail through the U.S. Postal Service, or other delivery service such as FedEx or UPS. The certificate of service must state how the opposing party was served and the date upon which service was made. If electronic service is relied upon through the Notice of Electronic Filing, that should be explicitly noted in the certificate of service.

§ 9.10 Notification Letter of Additional Authority Under Rule 6.09

A party may advise the court by letter of additional persuasive or controlling authority that has come to the party’s attention since filing its brief. See § 12.33, *infra*. The party must file the letter at

least 14 days before oral argument or before the first day of the docket on which a no-argument case is set. Rule 6.09(a)(1).

If the authority is published or filed less than 14 days before oral argument or less than 14 days before the first day of the docket on which a no-argument case is set, the party may promptly advise the court, by letter, of the citation. Rule 6.09(a)(1).

If the authority was published or filed after oral argument or after the first day of the docket on which a no-argument case was set, a party may advise the court by letter of the citation before the court's decision. Rule 6.09(a)(2).

The letter must not exceed 350 words. The letter may not be split into multiple filings to avoid the word limitation. The letter *must* contain a reference to the page(s) of the brief the letter supplements *or* a point argued orally to which the citation pertains. The letter *may* contain a brief statement concerning application of the citation. Rule 6.09(b).

The party filing the letter must serve all adverse parties united in interest with a copy. The letter, with proof of service, must be filed with the clerk of the appellate courts. Rule 6.09(c).

A party may respond to a letter notifying the court of additional authority. The party must file the response with the clerk of the appellate courts within 7 days after service of the letter; limit the response to the reference, brief statement, and 350-word limit under Rule 6.09(b); *and* serve the response on all adverse parties united in interest under Rule 6.09(c). Rule 6.09(d).

§ 9.11 Some Tips for Crafting an Effective Brief

Selecting and Organizing Issues:

Include only the issues most likely to succeed; “[w]eak points dilute strong ones.” Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument*, p. 85 (4th ed. 2009).

Organize the issues in a way that makes sense. For instance, begin with the strongest argument, or arrange the issues in the order in which the errors occurred below if the relative strength of the arguments is similar.

Separating issues into sub-issues and sub sub-issues is a helpful way of organizing the arguments section. For instance, each issue might have five main subheadings: Introduction, Standard of Review, Preservation of the Issue, Analysis, and Conclusion. The “Analysis” section might have several subsections addressing the different parts of a multi-part test or separately addressing (1) why an action constituted error, and (2) why the error requires reversal.

Writing the Statement of Facts:

“The facts must be scrupulously accurate.” Berry at p. 109.

It may be helpful to write the Arguments and Authorities section first. Then include any and all facts necessary to support the arguments made in that section in the Statement of Facts.

Organize the facts in a way that makes sense, *i.e.*, chronologically or in the same order as the issues to which they relate.

Use subheadings where necessary, *i.e.*, “The Crime,” “Pre-Trial Motions,” “Trial,” “Sentencing.”

PRACTICE TIP: Avoid simply relaying each witness’s testimony in the order in which the witnesses appeared. Garner, *The Winning Brief* pp. 365-67 (2nd ed. 2004). Make sure the testimony fits together to tell a story. Highlight inconsistencies between different witnesses’ testimony using words like “however” and “although.” Highlight corroborating testimony with words like “similarly.”

While the statement of facts may not include argument, the tone of this section can lay the groundwork for the argument that follows. For instance, rather than simply stating, “The district court denied the defendant’s request to proceed pro se,” consider writing, “The district court mocked the defendant’s request to proceed pro se and chastised him for ‘wasting everyone’s time.’” Rambo and Pflaum, *Legal Writing by Design* § 21.6, p. 368 (2001). Within the confines of the rule, this section is an opportunity to soften the ground for, and plant the seeds of, the argument that

will follow. Avoid overreaching, however; including statements in the statement of facts section that have no support in the record on appeal erodes the court's credibility in the writer. "We never, either through act or omission, misrepresent the truth." Rambo and Pflaum at 359.

While active voice is generally preferable to passive voice, passive voice may be appropriate where it minimizes a client's misdeeds. For example, rather than writing, "Mr. Jones beheaded Smith," consider writing, "Smith was beheaded." Rambo and Pflaum at 368.

Standard of Review and Preservation of the Issue:

Argue for the most favorable standard of review the law supports, but cite authority to the contrary if it exists.

PRACTICE NOTE: Do not be afraid to argue what the standard of review *ought* to be if it should be changed, but also note what the standard of review currently *is*.

The preservation section may not be as sexy as the argument section of the brief, but it is one of the most important. If an issue is not properly preserved, or if there is not a proper avenue for the appellate courts to consider the issue for the first time on appeal, then the rest of the brilliance contained in the argument section is for naught. Include a clear reference to where the issue was raised and ruled upon below. If the issue was not raised and ruled upon below, explain why the court can and should reach the issue anyway.

PRACTICE NOTE: Simply citing the exceptions to the general rule is insufficient; explain which of those exceptions allows the court to reach the issue. *State v. J.D.H.*, 48 Kan. App. 2d 454, 459, 294 P.3d 343 (2013).

Arguments and Authorities:

If an issue requires the application of a multi-step test, apply each step separately and clearly.

Support arguments with quality citations *or* with compelling arguments if no existing authority supports the argument. Focus on quality, rather than quantity; “[t]here is little or no reason to string cite.” Berry at p. 122.

Do not be afraid to look outside the jurisdiction, especially if there is no Kansas authority on point.

Avoid long block quotes, which a reader is likely to skip. Avoid using “Id.”

Be upfront and address unfavorable authority head on.

Anticipate and refute potential counter-arguments. Garner at p. 410.

Formatting:

Do not be afraid to use visual devices to aid the reader in identifying particularly important information. The appellate courts have recently begun to embrace visual devices within their own opinions, such as comparative tables when illustrating a point. See, *e.g.*, *State v. Wetrich*, 307 Kan. 552, 563, 412 P.3d 984 (2018). If there is a need to highlight or compare two competing sources (for instance an old versus a new version of a statute), doing so in a table embedded within the brief may make your point more clearly than a paragraph explaining the differences.

When writing an appellee or reply brief, examine the initial brief for weaknesses and identify them for the court. Look for errors of fact, errors of law, errors of logic or reasoning, inconsistent arguments, and accidental concessions. Berry at pp. 136-37.

The Conclusion:

Ask the Court for the *specific* relief requested. If the relief requested is atypical, make sure to cite authority for the relief requested or provide an explanation for why the court can and should act differently in your case than it has in others.